92-1998

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Thomas and ElizaBeth Webb Beyer,
Petitioners,

v.

Robert A. Cannon, M.D.; William J. Wenner, M.D.; Frank J. Loge, individually and as director of the University of California, Davis, Medical Center; The Regents of the University of California, Inc., a California corporation, and Does 1 through 50, inclusive,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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June 1993

QUESTION PRESENTED

Should this Court grant review to decide whether due process under the Fifth and Fourteenth Amendments to the Constitution provides parents the right to make reasonable medical decisions on behalf of their minor child, in the absence of any medical emergency, during a police hold, and also after temporary custody has been taken from the parents?

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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS and ELIZABETH WEBB BEYER,
Petitioners,

v.

ROBERT A. CANNON, M.D., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Petitioners Thomas and ElizaBeth Webb Beyer respectfully ask this Court to grant this petition for writ of certiorari seeking to reverse the order of the Court of Appeal for the State of California Third Appellate District (hereinafter court of appeal).

OPINIONS AND JUDGMENTS BELOW

On July 26, 1991, petitioners filed a second amended complaint (hereinafter complaint) in state court in California which included claims for violations of 42 U.S.C. §1983. Appendix A. On October 16, 1991, the law and motion (trial court) judge sustained the demurrer ruling that petitioners had no claim under 42 U.S.C. §1983 because respondents were absolutely immune from suit under California Penal Code §11172(a) according to *Thomas v. Chadwick,* 224 Cal.App.3d 813 (1990) *op. mod.,* 274 Cal.Rptr. 128.

Appendix B. A motion for reconsideration was denied December 24, 1991. Appendix C.

The order of the court of appeal, filed December 21, 1992, affirmed the judgment of the trial court. Appendix D. A petition for rehearing was denied January 13, 1993. Appendix E. Review by the California Supreme Court was denied March 17, 1993. Appendix F.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Rule 10.1 (b) and (c).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory provisions are involved in this case:

California Welfare and Institutions Code §300 states in pertinent part:

Any minor who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:

(b) The minor has suffered, or there is a substantial risk that the minor will suffer, serious physical harm or illness, as a result of...the willful or negligent failure of the parent or guardian to provide the minor with adequate...medical treatment....

Whenever it is alleged that a minor comes within the jurisdiction of the court on the basis of the parent's or guardian's willful failure to provide adequate medical treatment... the court shall give deference to the parent's ...medical treatment [or] nontreatment and shall not assume jurisdiction unless necessary to protect the minor from suffering serious physical harm or illness. In making its

determination, the court shall consider (1) the nature of the treatment proposed by the parent or guardian (2) the risks to the minor posed by the course of treatment or nontreatment proposed by the parent or guardian (3) the risk, if any, of the course of treatment being proposed by the petitioning agency, and (4) the likely success of the courses of treatment or nontreatment proposed by the parent or guardian and agency. The minor shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the minor from risk of suffering serious physical harm or illness.

California Welfare and Institutions Code §305 states in pertinent part:

Any peace officer, may, without a warrant, take into temporary custody a minor:

(b) Who is in a hospital and release of the minor to a parent poses an immediate danger to the child's health or safety.

California Welfare and Institutions Code §369 states in pertinent part:

(a) Whenever any person is taken into temporary custody under the provisions of Article 7 (commencing with Section 305) of this chapter and is in need of medical...care, the probation officer may, upon the recommendation of the attending physician...authorize the performance of such medical...care. The probation officer shall notify the parent...of the care found to be needed before such care is provided, and if the parent...object, *such care shall be given only upon order of the court in the exercise of its discretion.* Emphasis added.

(f) Nothing in this section shall be construed as limiting the right of a parent...who has not been deprived of the custody or control of the minor by order of the court, in providing any medical...treatment recognized or permitted under the laws of this state.

California Penal Code §11172(a) states in pertinent part:

No...health practitioner...who reports a known or

suspected instance of child abuse shall be civilly or criminally liable for any report required...by this article.

California Penal Code §11165.2(b) states in pertinent part:

An informed and appropriate medical decision made by a parent after consultation with a physician who has examined the minor does not constitute neglect.

The Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioners filed a complaint for violations of 42 U.S.C. §1983 based upon due process rights provided by the Fifth and Fourteenth Amendments to the United States Constitution. The rights that were violated included the petitioners' rights as parents to make reasonable medical decisions for and provide care and comfort to their child. As alleged in the complaint upon which a demurrer was sustained, petitioners are the natural parents of Seth Webb Beyer, who was a seven month old patient of respondents June 1-24, 1990 at University of California, Davis, Medical Center (hereinafter UCD). Appendix A.[1]

Between June 6 - 9, 1990, petitioners requested that Seth not receive one certain no-protein formula called 80056 because they believed Seth deteriorated when he was fed it, and requested that he receive an alternate medically acceptable formula. Several alternatives were used during that time. Seth was tentatively diagnosed with a very rare metabolic disorder called propionic acidemia (hereinafter

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1 The complaint included Seth Beyer as a plaintiff. At the hearing for the motion for reconsideration, the claim of Seth Beyer for medical malpractice was severed from his parents. A jury trial was held May 4 to June 7, 1993. Defense counsel, apparently successfully argued, that the case was a parental rights case, not a medical malpractice case. A verdict for the defense was returned following a week of deliberations.

PA). Treatment often includes a low protein diet. *Id.*

On Saturday June 9, 1990, Dr. Cannon, a consulting, on-call doctor, mandated formula 80056 despite parental requests to feed readily available alternatives. Hours earlier, another physician at UCD agreed with the family and ordered a different formula. However, Dr. Cannon was unwilling to continue the same formula despite family requests. In addition, the family requested a second opinion or a transfer to another hospital. *Id.*

As a result of the parental requests for an alternative infant formula, second opinion or transfer, Dr. Cannon accused Seth's parents of medical neglect, initiated a police hold[2] in accordance with California Welfare and Institutions Code §300(b) and §305 on June 9, 1990, and used the mandated formula. As alleged in the complaint, *no medical emergency existed.*[3] Requests for second opinion or transfer were denied. Seth suffered neurological deterioration, seizures, his breathing stopped and his skin sloughed after the mandated formula was used. *Id.*

At no time did Seth's parents ever refuse medical treatment or refuse to comply with the recommendation of a low protein diet. They simply requested alternative low protein foods or a transfer, if respondents refused to provide alternative foods. *Id.*

Other commercially available formulas and low protein regular foods were available. Alternative treatment in the form of high dose carnitine (a vitamin) was available for use to treat PA instead of low protein formulas in June 1990. Despite the availability of other formulas and treatment, Dr.

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2 Since no discovery has been permitted on petitioner's claim, plaintiff's were unaware that the police officer who initiated the hold was an employee of the University of California, until trial on the minor's claim. Thus, the portion of the complaint stating the officer was from Sacramento County is in error.

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3 In testimony on the minor's medical malpractice claim, Dr. Cannon admitted no emergency existed.

Wenner, Dr. Cannon's associate, initiated a second police hold on June 11, 1990. He, too, mandated the same formula that had caused the same reactions despite parental requests to use an alternative. Once again, Seth suffered the same symptoms. Requests for a different formula, a second opinion and a transfer were denied by the respondents. *Id.*

On June 15, 1990, a hearing of the juvenile court appointed a county social worker as guardian ad litem to Seth. The juvenile court never issued any order for particular medical treatment in accordance with Welfare and Institutions Code §369(a). The parents continued to request transfer and a second opinion, but these were denied. Finally, by order of the court, Seth was transferred on June 24, 1990 to a metabolic specialist out of state where he was found to be in a complete state of protein starvation. *Id.*

Following a hearing on July 6, 1990, full custody of Seth was returned to his parents. Seth remained hospitalized out of state until July 6, 1990, whereupon he returned home. Following a hearing on the demurrer, the trial court ordered petitioners to amend their complaint to "delete conduct after the police hold and allege facts prior to that time constituting a cause of action under §1983" under the rationale that the respondents' conduct following the police hold was absolutely privileged pursuant to Penal Code §11172(a) as set forth in *Thomas v. Chadwick* 224 Cal.App.3d 813, *op. mod.* 274 Cal.Rptr. 129 (1990).

The heart of petitioners' claim are the violations of parental medical decisionmaking rights following the police hold. There were repeated requests for alternative formula, a second opinion and a transfer to a hospital specializing in treatment of rare metabolic disorders following the police hold. However, the trial court refused to hear any argument with regard to violations of civil rights following the police hold under the rationale that respondents were immune from suit under 42 U.S.C. §1983.

The period of time between Dr. Cannon's discussion with the family and his initiation of the police hold was

fifteen minutes. It would be difficult to assert a violation of constitutional proportion in this minute time period. Thus, an appeal to the court of appeals was taken.

The court of appeals affirmed the trial court order in that: even though the defendants were not entirely immune from suit according to Penal Code §11172(a), due process was not violated because an emergency existed. Appendix D. This is directly contrary to paragraph 19 of plaintiff's complaint which indicates that an emergency to feed 80056 did not exist. The court of appeals decided that there *was* an emergency. This is a question of fact to be decided by a trier of fact, not an appellate court.

Further, the court stated petitioners' fatal flaw was that they failed to amend their complaint when leave was granted by the trial court. Appendix D, fn 10. This placed petitioners in a Catch-22 because the trial court order specifically prohibited alleging any new facts occurring after the police hold on June 9, 1990. The orders between the court of appeals and the trial court conflict and have left petitioners with no remedy.

SUMMARY OF THE ARGUMENT

This Petition should be granted to resolve directly conflicting opinions between the decision in this case and the Eleventh Circuit opinion and the wealth of U.S. Supreme Court case law granting medical decisionmaking rights to parents. A decision on this issue will have far-reaching impact on the rights of parents to choose between medically acceptable alternative treatments. A physician who prefers a course of treatment rejected by a parent cannot be permitted to fabricate an emergency, initiate a police hold or petition the court to override a parent's prerogative. Due process must be strictly tailored and not allow physicians complete authority to make medical decisions for the children they treat without regard to parental input. Failure to comply with statutory requirements for notice and hearing prior to the

institution of objectionable medical treatment under California Welfare and Institutions Code §369(a) violates due process.

This Petition should be granted to provide petitioners relief from the conflicting rulings of the trial court which required the complaint to be amended to delete any conduct following the police hold on June 9, 1990 [Appendix B] and the court of appeals which indicated that petitioners fatal flaw was that they failed to amend their complaint when leave was granted by the trial court. Appendix D, fn 10.

This Petition should be granted to clarify the rights of parents to make medical decisions after they have been accused of medical neglect. The rights of parents to make medical decisions do not escheat to the physicians who treat children; nor do our Constitution or statutes permit such well meaning health care professionals to commandeer them.

Further, this Petition should be granted because no reported California case law limits the blanket immunity for health practitioners who report child abuse. In fact, according to *Thomas v. Chadwick*, there is immunity under the state statute from a §1983 claim, even if the report is intentionally false. 224 Cal.App.3d 813, *op. mod.* 274 Cal.Rptr. 129 (1990).

Few cases have been reported in this complex area of parental rights to medical decisionmake after the parents are accused of medical neglect in the face of a police hold or temporary custody. "...[A]s long as parents choose from professionally accepted treatment options the choice is rarely reviewed in court and even less frequently supervened." *Bowen v. American Hospital Association,* 476 U.S. 610 at 627 n.13, 106 S.Ct. 2101, 90 L.Ed.2d 584. This case provides this Court an opportunity to address these issues.

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REASONS FOR GRANTING THE WRIT

I. THE CALIFORNIA COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS PROCEDURAL DUE PROCESS RIGHTS WERE NOT VIOLATED

A. The Court of Appeals Decision Conflicts With The Eleventh Circuit Decision On This Issue

Three significant differences exist between the findings in this case and the Eleventh Circuit opinion. First, under the Eleventh Circuit decision, a summary judgment motion to dismiss the treating doctors was denied. *Bendiburg v. Dempsey*, 909 F.2d 463, 467 (11th Cir. 1990). Here, the demurrer on a similar fact pattern was sustained even though petitioners stated facts showing a violation of due process. The court of appeals reasoned that the petitioners failed to adequately state sufficient facts and strictly construed the complaint because petitioners did not amend when given the opportunity to do so. This reasoning fails to take into account the direct order of the trial court wherein any argument under 42 U.S.C. §1983 was denied and also, amendment was required to delete all conduct following the police hold on June 9, 1990.

Both the father in *Bendiburg* and the parents in this case were aware of medically acceptable alternatives. In each case, the decision by the parent as to one course of medically reasonable treatment resulted in the doctors initiating custody proceedings in order to carry out nonemergency treatment which resulted in harm to the children. In both cases, physicians wilfully disregarded the rights of the parents and mandated treatment to which medically reasonable alternatives existed.

Bendiburg provided adequate proof to reverse a decision to dismiss the treating doctors on a summary judgment motion. In this case, sufficient facts to show a

violation of due process were written in the complaint. Courts have traditionally reviewed civil rights complaints liberally, especially when they are brought *pro se*. *Weller v. Dept. of Soc. Serv. For Baltimore*, 901 F.2d 387, 390 (4th Cir. 1990). However, the court of appeal denied petitioners' request to reverse the trial court order sustaining the demurrer. Thus, under the reasoning of the court of appeal, and arguably the California Supreme Court that denied review, these petitioners had no due process right to make medical decisions once temporary custody was removed by a police hold.

Second, is that whether an emergency existed was a question of fact left to the trier of fact in *Bendiburg*. *Id.* at 468-9. In the case at bar, the appellate court stated that an emergency existed despite the petitioners' statement in their complaint that such was not the case. Thus, when no emergency existed, a post deprivation hearing, occurring five days after the objectionable formula was started does not meet due process. During those five days, the infant suffered neurological deterioration, multiple seizures, episodes of stopping breathing and his skin sloughed, which had never occurred prior to this. In addition, the parents' right to visit, hold and comfort their child was restricted during this time by the respondents.

Third, with regard to the issue of violation of substantive due process, this case is distinguishable from *Bendiburg*. In the instant case another physician agreed with the Beyers and changed the formula just hours before Dr. Cannon mandated 80056 and initiated a police hold for medical neglect. The Beyers had another physician who had examined Seth and wrote an order for a different formula and should never had been charged with neglect in accordance with California Penal Code §11165.2(b). Despite this statutory protection, a police hold was initiated and parental medical decisionmaking rights were lost.

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B. The Court of Appeals Decision Conflicts With This Court's Decisions On Similar Issues

In turning to other decisions by this Court regarding the right to make medical decisions, there is a wealth of case law, including *Cruzan v. Director, Missouri Dept. of Health,* 497 U.S. 261, 278, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990). See also *Washington v. Harper*, 494 U.S. 210, 221, 108 L.Ed.2d 178, 110 S.Ct. 1028 (1990). In the case of a minor child, their rights are only meaningful as they are exercised by others on their behalf. However, there is no case law by this Court discussing the right of parents to make medical decisions for their minor children during a police hold or when temporary custody is removed.

Other courts have held that parents may choose one course of medical treatment over another and such choice should not be changed by a court without determining that a child's life is in imminent danger. *Weber v. Stony Brook Hosp.* 60 N.Y.2d 208, 456 N.E.2d 1186, 1187, 469 N.Y.S.2d 63 (1983) *cert. den.*, 461 U.S. 1026. This right to choose among medically acceptable alternatives should not change when a charge of medical neglect has been stated against parents. If physicians disregard such parental decisions before or after temporary custody, they may be liable for violation of 42 U.S.C. §1983. *Id.* at 469.

Professionals cannot willfully disregard the right of parents to make decisions concerning treatment given to their children, especially in non-emergency situations. *Id.* at 470. Parents retain certain "residual rights" which cannot be abrogated by a legal custodian. *Bendiburg v. Dempsey* (N.D.Ga. 1989) 707 F.Supp. 1318, 1339. Simply put--parental rights to make health care decisions exist even in the face of custody proceedings. Such facts were adequately alleged in petitioner's complaint.

This Court has maintained that parents have an interest in the care and custody of their children once they have lost temporary custody of their children. This Court held:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. *Santosky v. Kramer*, 455 U.S. 745 at 754, 102 S.Ct. 1388 at 1394, 71 L.Ed.2d 599 (1982).

Now, under the court of appeals ruling, a physician needs only to allege there was an emergency and no hearing or other court ordered action is required before a treatment refused by the parents is started under the auspices of a police hold.

> When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom, it becomes the *duty* of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification. *Bates v. City of Little Rock*, 316 U.S. 516, 525, 80 S.Ct. 412, 417, 4 L.Ed.2d 480 (1960). Emphasis added.

An important issue has not yet been addressed by this Court. That is....are we to entrust all medical decisionmaking to the same doctors who accuse parents of medical neglect, when a child is under a police hold or temporary custody?

II. CALIFORNIA CASE LAW PROVIDING BLANKET IMMUNITY TO REPORTERS OF CHILD ABUSE CONFLICTS WITH FEDERALLY PROTECTED RIGHTS.

California case law grants broad immunity from liability once health practitioners report child abuse. *Thomas v. Chadwick* states that there is immunity for removing a second child after the death from suspected abuse of another

child, even when a report was negligent, reckless or intentionally false. 224 Cal.App.3d 813, *op. mod.* 274 Cal.Rptr. 129 (1990).

The *Thomas* case went so far as to provide state statutory immunity against a 42 U.S.C. §1983 suit by interpreting Congressional intent to provide blanket immunity under the 1974 Child Abuse Prevention and Treatment Act (42 U.S.C. §5101 et seq.). In that case, parents could not recover against a physician who failed to recognize an infant died of a congenital defect, rather than abuse, and caused the removal of the parents' only other child from their custody. Based on the *Thomas* decision, the parents' claim in *Beyer v. Cannon* was dismissed.

Other California cases place no limit on this immunity. *Krikorian v. Barry* finds that a psychologist is immune for negligent conduct with regard to determining whether children were abused. 196 Cal.App. 3d 1211, 242 Cal.Rptr. 312 (1987). *Storch v. Silverman* held that a malpractice suit, presumably for negligent diagnosis, is protected. 186 Cal.App.3d 671, 231 Cal.Rptr. 27 (1986).

Essentially, California has no reported case law which would curtail abuse by health practitioners of the immunity statute, Penal Code §11172(a), which provides blanket protection.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

THOMAS BEYER and ELIZABETH WEBB BEYER, individually and SETH WEBB BEYER, by and through his Guardian ad Litem ELIZABETH WEBB BEYER ,
Plaintiffs,

vs.

ROBERT A. CANNON, M.D.; WILLIAM J. WENNER; M.D.; FRANK J. LOGE, individually and as director of the University of California, Davis, Medical Center; THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, INC., a California corporation, and DOES 1 through 50, inclusive;
Defendants.

No. 520845
SECOND AMENDED COMPLAINT FOR DAMAGES

1. Violation of 42 U.S.C. §1983
2. Battery
3. Negligent Infliction of Emotional Distress
4. Intentional Infliction of Emotional Distress

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Plaintiffs THOMAS BEYER and ELIZABETH WEBB BEYER, individually, and SETH WEBB BEYER, a minor,

by and through his Guardian ad Litem ELIZABETH WEBB BEYER, by and through their attorneys of record, ElizaBeth Webb Beyer, Esq. and Lynn G. Pierce, Esq., for their causes of action against the above-named Defendants, and each of them, complain, allege and aver as follows:

PARTIES

1. Defendant THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, INC., (hereinafter "UC") is a California corporation, located and doing business in the County of Sacramento, State of California as University of California, Davis, Medical Center. The University of California, Davis, Medical Center (hereinafter "UCD") is an entity functioning under the auspices of the UC corporation.

2. At all times mentioned herein, Defendant ROBERT CANNON, M.D., was a physician duly licensed to practice medicine in the State of California, residing and doing business in Sacramento, the County of Sacramento, State of California, was a UC employee and at all times held himself out to be an expert in the treatment of organic acidemia.

3. At all times mentioned herein, Defendant WILLIAM WENNER, M.D., was a physician duly licensed to practice medicine in the State of California, residing and doing business in Sacramento, the County of Sacramento, State of California, was a UC employee and at all times held himself out to be an expert in the treatment of organic acidemia.

4. At all times mentioned herein, Defendants CANNON and WENNER were in partnership, practicing medicine together.

5. At all times mentioned herein, Defendant FRANK J. LOGE was the director of the hospital and clinics of UCD and ultimately responsible for the acts of the employees and agents of UCD, and was residing in the County of Sacramento, State of California.

6. Plaintiffs THOMAS and ELIZABETH WEBB BEYER and the minor child SETH WEBB BEYER are, and were at all times relevant herein residents of the City of Reno, County of Washoe, State of Nevada. Plaintiffs THOMAS and ELIZABETH WEBB BEYER are the natural parents of

plaintiff SETH WEBB BEYER.

7. The true names and capacities whether individual, corporate, associate or otherwise of Defendants DOES 1 through 50, inclusive, and each of them, are unknown to Plaintiffs at this time. They therefore sue said Defendants by such fictitious names and when their true names and capacities are ascertained, Plaintiffs will amend their Complaint accordingly. Plaintiffs are informed and believe and, thereon allege that each of the Defendants designated herein as a DOE are responsible in some manner for the events and happenings herein referred to and each DOE Defendant caused the injuries and damages complained of herein.

8. Plaintiffs are informed and believe and thereon allege that at all times herein mentioned, each of the defendants sued herein was the agent, employee, joint venturer or partner of each of the remaining defendants, and each of them, was at all times acting within the purpose and scope of such agency, employment, joint venture or partnership.

FIRST CAUSE OF ACTION
VIOLATION OF 42 U.S.C. §1983

9. Plaintiffs' First Cause of Action is directed only to Defendants CANNON, WENNER, LOGE and DOES 1 - 50, not to Defendant UC.

10. Plaintiff SETH WEBB BEYER, a minor seven months of age, was brought for medical treatment to the Emergency Room of UCD by his parents THOMAS and ELIZABETH WEBB BEYER on June 1, 1990 because he was not alert. He was admitted to the Pediatric Intermediate Intensive Care Unit.

11. By June 3, 1990, SETH WEBB BEYER was moribund and near death. A tentative diagnosis of storage disorder, a fatal disorder, was given. No confirmed diagnosis was made at that point due to the likelihood that the minor child would not have survived the tests required (i.e. a liver biopsy). He was taken off all life support by medical personnel at UCD

with the consent of THOMAS and ELIZABETH WEBB BEYER. Late in the evening of June 3, 1990, THOMAS and ELIZABETH WEBB BEYER noted a positive change in his condition and requested that his intravenous drip be restarted despite the terminal diagnosis.

12. Between June 2 and June 8, 1990, the physicians at UCD gave SETH WEBB BEYER four different diagnoses. At about 1:30 p.m. on June 8, 1990, the UCD physicians had a third diagnosis and at about 2:30 p.m. on June 8, 1990, the UCD physicians had a fourth and final diagnosis of propionic acidemia (PA). The family was told that PA is a very rare diagnosis with perhaps twenty living patients in the United States.

13. At this point, the family had little confidence in the medical professionals' ability to correctly diagnose or treat SETH'S condition, but were willing to try any reasonable treatment plan suggested. Dr. Charles Apilgaard, pediatrician, was the attending physician at this time.

14. At a family conference at about 2:30 p.m. on June 8, 1990, the health care providers at UCD discussed a treatment plan consisting of a low protein diet. The family was in accord with this treatment plan and were willing to comply with this dietary treatment because the family was given the freedom to choose his foods so long as they were low in protein. SETH WEBB BEYER was scheduled for discharge between June 11 and 12, 1990 because he had dramatically improved without significant medical intervention or treatment plan between June 4 to June 8, 1990 and without continued use of formula 80056, a no protein formula which the family had refused.

15. On June 9, 1990 at about 11:00 a.m., an on-call, consulting physician (which means that he was covering for WILLIAM WENNER and was not a physician with the primary responsibility for diagnosis and treatment), Defendant ROBERT CANNON, who had never seen the patient or family prior to June 9, 1990, and who had only treated one case of PA approximately 10 years prior,

represented that there was only one treatment in the form of a no protein formula, called formula 80056, and insisted that the infant be placed on this formula. He knew or should have known that there was more than one commercially available low protein formula and also more than one treatment for PA. Up until this time of June 9, 1990 at about 11:00 a.m., 80056 was a recommended, but not required formula. The family had previously been given the option of which low protein nutrition to provide.

16. ELIZABETH WEBB BEYER, the infant's mother, who had been a Registered Nurse since 1979, refused formula 80056 starting on or about June 8, 1990 because she noted her son's condition deteriorated with each administration attempted during the previous week. On June 9, 1990, at about 11:00 a.m. she told ROBERT CANNON of her concerns about formula 80056 and ROBERT CANNON told the mother that he did not believe formula 80056 could cause any detrimental side effects or allergic reactions. She requested an alternative low protein dietary formula or foods and transfer to a metabolic center.

17. On June 9, 1990, at about 11:00 a.m. after less than a 15 minute conversation with the mother and family, ROBERT CANNON, through Linda Boyers, Pediatric Social Worker for UCD and the Sacramento County police, and without speaking to any other attending physician, made the decision and caused the placement of the California Welfare and Institutions Code §300(b) police hold on the infant, accusing THOMAS and ELIZABETH WEBB BEYER of child abuse for their refusal to use formula 80056.

18. ROBERT CANNON stated that 80056 was required because it provided vitamins and minerals, but he was unwilling to use another vitamin and mineral supplement and instead insisted upon this one formula. ROBERT CANNON failed to provide alternative dietary treatment as requested by the family. Further, in a telephone conversation with the mother on June 9, 1990, ROBERT CANNON stated that it was "a matter of principle" and that was why he was

mandating formula 80056.

19. On or about June 9, 1990 at about 11:00 a.m., ROBERT CANNON directly or through an agent,indicated to the social workers and police that an emergency existed and that there was a substantial risk that the minor would suffer serious physical harm if the minor did not receive formula 80056 when such was not the case. Custody of SETH WEBB BEYER was transferred to The Welfare Department, Dependent Intake in Sacramento County at about 11:00 a.m. on June 9, 1990.

20. Transfer to a metabolic treatment facility and treating metabolic specialist was obstructed by Defendants CANNON, WENNER and LOGE until a court order was finally obtained.

21. At no time did Plaintiffs THOMAS and ELIZABETH WEBB BEYER refuse medical treatment or refuse to comply with the recommendation of a low protein diet. Plaintiffs merely requested alternative low protein dietary management without the use of formula 80056.

22. The Plaintiffs THOMAS and ELIZABETH WEBB BEYER were deprived of their rights as parents without due process through the unilateral decision made by one physician, ROBERT CANNON. Additionally, Defendants CANNON and WENNER worked individually and together to keep SETH WEBB BEYER under their control and care depriving Plaintiffs THOMAS and ELIZABETH WEBB BEYER of their privacy and liberty interests as concerned and caring parents.

23. No informed consent or informed refusal concerning formula 80056 was provided. ROBERT CANNON and WILLIAM WENNER, through the California Welfare and Institutions §300(b) police hold, attempted to coerce the family into accepting this dietary treatment, formula 80056, which they held out to be the only suitable formula for the minor infant. Both physicians failed to provide alternative dietary treatment.

24. In June 1990, there were several other commercially

available formulas and low protein regular foods (i.e., foods other than milk or meat) which were available to treat PA. Alternative treatment in the form of high dose carnitine (a vitamin) was available for use to treat PA instead of low protein formulas.

25. THOMAS and ELIZABETH WEBB BEYER sought to discharge ROBERT CANNON and WILLIAM WENNER as their son's treating physicians and requested a second opinion from a medical expert other than CANNON'S partner, WILLIAM WENNER. THOMAS and ELIZABETH WEBB BEYER wished to have another formula or dietary treatment provided.

26. Hospital administration at UCD, including Defendant FRANK LOGE, hospital director, was informed of these requests. Each request was denied by the Defendants.

27. Despite strong parental objections, SETH WEBB BEYER was placed on formula 80056 and as a proximate result of the administration of this formula, he suffered great mental and bodily harm including neurological deterioration, cessation of respirations, seizures, skin sloughing, peeling and breakdown. Prior to the administration of 80056, the minor infant had never experienced cessation of respirations, seizures or skin problems.

28. UCD hospital administration, including Defendant FRANK LOGE, was notified by THOMAS and ELIZABETH WEBB BEYER regarding the deteriorating condition of their son. No attempt to resolve the dispute between the physicians and the family was ever suggested or attempted. The physicians were allowed to improperly treat the minor infant unchecked and unmonitored. Hospital administration, including Defendant FRANK LOGE, failed to facilitate a transfer of the infant to a competent metabolic center.

29. Despite vehement protests by the family, WILLIAM WENNER, who was and is a partner of ROBERT CANNON, placed the infant on this formula a second time on or about June 13, 1990, with knowledge of the prior

treatment and side effects encountered, which proximately resulted in the same great mental and bodily harm including profound neurological deficits, the extent of which is not known at this time, cessation of respirations, seizures, skin sloughing, peeling and skin breakdown.

30. Ultimately, by order of the Superior Court of the State of California in and for the County of Sacramento, at the request of the parents, transfer of the infant was permitted to University of Missouri-Columbia where the infant received competent medical and nursing care. Even after this Order of the Court was known to the Defendants, Defendant WENNER actively attempted to obstruct the transfer of the infant. SETH WEBB BEYER was transferred to Missouri via life flight on June 24, 1990.

31. Upon arrival at University of Missouri-Columbia, SETH WEBB BEYER was found to be in a state of complete protein deprivation and starvation. THOMAS and ELIZABETH WEBB BEYER agreed with the treatment provided by Dr. Richard Hillman at University of Missouri-Columbia which included more protein, regular foods and a different formula called MSUD. Custody was thus transferred back to THOMAS and ELIZABETH WEBB BEYER at the Jurisdictional Hearing of July 6, 1990.

32. Due to the multiple problems encountered with various low protein formulas, SETH WEBB BEYER is not currently receiving any commercially available low protein product, but rather is receiving alternative therapy, which was available in June 1990.

33. At all times mentioned in this Complaint, Defendants CANNON, WENNER, and LOGE were acting under the color of their official capacities, and their acts were performed under the color of the statutes, ordinances, charters, customs and usages of the State of California.

34. The actions of the Defendants CANNON, WENNER and LOGE were contrary to the requirements of due process.

35. As a proximate result of the acts or failure to act on the part of Defendants CANNON, WENNER, and LOGE,

THOMAS and ELIZABETH WEBB BEYER were deprived of their privacy and liberty interests as concerned parents in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution, of 42 U.S.C. Sections 1983 and of the laws of the State of California.

36.The Defendants, CANNON, WENNER, and LOGE, acting under color of state law as individuals and as employees or agents of Defendant UCD, wrongfully obtained and maintained custody of SETH WEBB BEYER in violation of the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution. Additionally, Defendants violated provisions of Title 22 California Code of Regulations §70707.

37.As a proximate result of the violation of the civil rights of plaintiffs under 42 U.S.C. 1983, by Defendants CANNON, WENNER, and LOGE, Plaintiffs have been required to retain the services of counsel for vindication of said rights, and are thereby entitled to attorney's fees under 42 U.S.C. Section 1988. Plaintiffs have suffered extreme emotional pain and suffering, which continues to this day, physical damages, loss of wages and other losses and costs as a proximate result of the acts or failure to act by Defendants CANNON, WENNER and LOGE in an amount in excess of the jurisdictional minimum of this Court.

38. The above-mentioned conduct by Defendants was not privileged, may also have been willful, malicious, and made with the intent to inflict severe mental pain and distress and anxiety on Plaintiffs or was done with gross carelessness on the part of Defendants as amounted to a willful and reckless disregard of the consequences; for this reason, Plaintiffs seek punitive damages.

SECOND CAUSE OF ACTION

BATTERY

39.Plaintiffs replead and reallege the allegations set forth in paragraphs 1 through 38, inclusive, of the Plaintiffs' First Cause of Action as though fully set forth herein.

40. At the time and place stated above, Defendants, and each of them, did cause a formula or formulas to be fed to the minor infant, SETH WEBB BEYER, against his parents wishes and to his detriment and with the knowledge of previous side effects.

41. In doing the acts alleged above, Defendants, and each of them, acted with the intent to make a contact with the minor infant.

42. At no time did the Plaintiffs consent to any of the acts of Defendants.

43. As a proximate result of the acts of each Defendant as alleged above, Plaintiff SETH WEBB BEYER suffered great mental and bodily harm including profound neurological deficits, the extent of which is not known at this time, cessation of respirations, seizures, skin sloughing, peeling and breakdown. Plaintiffs have suffered extreme emotional pain and suffering, which continues to this day, physical damages, loss of wages and other losses and costs as a proximate result of the acts by each Defendant in an amount in excess of the jurisdictional minimum of this Court.

44. The above-mentioned conduct by Defendants was not privileged, and was willful, malicious, and made with the intent to inflict severe mental pain and distress and anxiety on Plaintiffs or was done with gross carelessness on the part of Defendants as amounted to a willful and reckless disregard of the consequences; for this reason, Plaintiffs seek punitive damages.

THIRD CAUSE OF ACTION

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

45. Plaintiffs replead and reallege the allegations set forth in paragraphs 1 through 44, inclusive, of the Plaintiffs' First and Second Cause of Action as though fully set forth herein.

46. As a result of the aforementioned acts of the Defendants and also, the Defendants, and each of them, acted negligently in administering a formula or formulas known to cause side effects without providing alternative dietary management, wrongfully placing a police hold and taking

custody of SETH WEBB BEYER, restricting visiting privileges of the infant's parents and family, denial of appropriate medical care for SETH WEBB BEYER, denial of transfer to a competent metabolic treatment center, denial of a second medical opinion and overall lack of cooperation with the Plaintiffs and violations of Title 22 California Code of Regulations §70707 and as a direct and proximate result of the negligent acts of Defendants, and each of them, THOMAS and ELIZABETH WEBB BEYER, who were at the bedside of SETH WEBB BEYER while he suffered injury from the negligent acts of the Defendants became upset and nervous and disturbed in body and mind so that they were unable to work, could not sleep properly, were unable to eat properly and experienced extreme emotional distress. Plaintiffs have suffered extreme emotional pain and suffering, which continues to this day, physical damages, loss of wages and other losses and costs as a proximate result of the acts by each Defendant in an amount in excess of the jurisdictional minimum of this Court.

47. The above-mentioned conduct by Defendants was not privileged, negligent and may also have been willful, malicious, or made with the intent to inflict severe mental pain and distress and anxiety on Plaintiffs or were done with gross carelessness on the part of Defendants as amounted to a willful and reckless disregard of the consequences; for this reason, Plaintiffs seek punitive damages.

FOURTH CAUSE OF ACTION
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

48. Plaintiffs replead and reallege the allegations set forth in paragraphs 1 through 47, inclusive, of the Plaintiffs' First through Third Cause of Action as though fully set forth herein.

49. Plaintiffs THOMAS and ELIZABETH WEBB BEYER helplessly watched the neurologic, cardiac and respiratory deterioration of their son while at their son's bedside when he was placed on the dietary therapy forced upon their son by

the Defendants. Such aforementioned acts of the Defendants were outrageous and unprivileged and done with reckless disregard of the probability of causing emotional distress.

50. The emotional trauma, fright and consequent injuries suffered by Plaintiffs THOMAS and ELIZABETH WEBB BEYER were brought about by deliberate and malicious above-mentioned acts on the part of the Defendants to injure the Plaintiffs, or that the fright and injuries resulted from such gross carelessness on the part of Defendants as amounted to a willful and reckless disregard of the consequences. Plaintiffs have suffered extreme emotional pain and suffering, which continues to this day, physical damages, loss of wages and other losses and costs as a proximate result of the acts by each Defendant in an amount in excess of the jurisdictional minimum of this Court.

51. The above-mentioned conduct by Defendants was not privileged, and was willful, malicious, and made with the intent to inflict severe mental pain and distress and anxiety on Plaintiffs; for this reason, Plaintiffs seek punitive damages.

WHEREFORE, Plaintiffs each pray judgment against Defendants, and each of them, as follows:

A. For general damages as to each plaintiff in amounts according to proof for emotional harm, pain and suffering, past, present and future, in an amount in excess of the jurisdictional minimum of this Court;

B. For special damages according to proof;

C. For attorneys' fees and costs of suit;

D. For punitive damages;

E. For prejudgment interest of 10% or the highest legal rate pursuant to CCP §998 and Civil Code §3291; also for interest from the date of judgement;

F. For such other and further relief as the Court may deem proper.

DATED: July 25th, 1991

LAW OFFICES OF ELIZABETH WEBB BEYER
LAW OFFICES OF LYNN G. PIERCE

BY: _____
ElizaBeth Webb Beyer
Attorney for Plaintiff

BY: _____
Lynn G. Pierce
Attorney for Plaintiff

VERIFICATION

I, ELIZABETH WEBB BEYER, am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matter, I believe it to be true.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 24th day of July, 1991.

_____
ELIZABETH WEBB BEYER, R.N., M.S., J.D.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

DATE & TIME: October 16, 1991 DEPT. NO.: 27
JUDGE : RONALD B. ROBIE CLERK : P. ALLEN
REPORTER : NCR BAILIFF : R. SALVATIERRA

THOMAS BEYER & ELIZABETH WEBB BEYER & SETH W. BEYER, a minor through his Guardian ad Litem,

vs. CV520845

ROBERT A. CANNON, M.D., WILLIAM J. WENNER, et al., and DOES 1 through 50, inclusive

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

The court, having taken defendants' demurrer under submission, now rules as follows:

Cause of action 1: The conduct of defendants after the police hold pursuant to Welfare and Institutions Code §300(b) (approximately 11 a.m. June 9) is absolutely privileged pursuant to Penal Code §11172. It does not appear that any conduct prior to that time rises to the level of a constitutional violation cognizable under 42 U.S.C. §1983. Sustained with leave to amend to delete conduct after the police hold and allege facts prior to that time constituting a cause of action under §1983.

Cause of action 2: The act of giving the minor formula over the objections of his parents may be a battery but it appears form the pleadings that at the time the formula was given, the minor was in the custody of the county (That is, after the police hold). Sustained with leave to amend to delete conduct after the police hold and to alleges facts prior to that time

constituting battery.

Cause of action 3: "'[T]he *negligent* causing of emotional distress is not an independent tort but the tort of *negligence...*'" *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal. 3d 583, 588. Under *Thing v. LaChusa* (1989) 48 Cal. 3d 644 the defendants must be negligent as to the administering formula known to cause side effects and failing to adequately diagnose and treat the minor are sufficient allegations of negligence (malpractice) but allegations as to wrongfully placing a police hold and taking custody of the child and restricting visiting privileges are absolutely privileged (See ruling above). It is not necessary for a separate negligence cause of action as long as these allegations are included in this cause of action. However, under *Thing* the plaintiff must be *"present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim."* See also, *Ochoa v. Superior Court* (1985) 39 Cal. 3d 159. Sustained with leave to amend to allege each of these factors as to the negligent conduct discussed above.

Cause of action 4: Sustained without leave to amend. The conduct is not outrageous.

10 days to amend, and thereafter, 10 days to file responsive pleading by defendant.

October 16, 1991
Ronald B. Robie, Judge of the Superior Court

Book: 27
Page: 180
Date: 10/16/91 SACRAMENTO SUPERIOR COURT
Case No.: CV520845
Case Title: Beyer/Cannon BY: P. ALLEN, Deputy

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ATTORNEYS FOR: Defendants ROBERT A. CANNON, M.D., WILLIAM J. WENNER, M.D., FRANK J.LOGE, and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

THOMAS BEYER and ELIZABETH WEBB BEYER, individually and SETH WEBB BEYER, a minor, by and through his Guardian ad Litem ELIZABETH WEBB BEYER,	No. 520845 ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER
Plaintiffs, vs.	
ROBERT A. CANNON, M.D.; WILLIAM J. WENNER; M.D.; FRANK J. LOGE, individually and as director of the University of California, Davis, Medical Center; THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, INC., a California corporation, and DOES 1 through 50, inclusive; Defendants.	

The motion for reconsideration of order of plaintiffs THOMAS BEYER and ELIZABETH WEBB BEYER,

individually, and SETH WEBB BEYER, a minor, by and through his Guardian Ad Litem, ELIZABETH WEBB BEYER, came on regularly for hearing on December 17, 1991 before the Honorable Ronald B. Robie in Department 27 of the above-entitled Court. ElizaBeth Webb beyer, Esq., and Lynn G. Pierce, Esq., appeared as attorneys of record for plaintiffs; Edwin T. Weiberg appeared as attorney of record for defendants ROBERT A. CANNON, M.D., WILLIAM J. WENNER, M.D., FRANK J. LOGE, and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA.

After consideration by the Court of all of the pleadings, records and papers on file herein and arguments presented by counsel,

IT IS HEREBY ORDERED AS FOLLOWS:

1. Plaintiffs' motion for reconsideration is denied.

2. The Court further grants plaintiff SETH WEBB BEYER, by and through his Guardian Ad Litem, ELIZABETH WEBB BEYER, 10 days leave to amend.
Plaintiffs THOMAS BEYER and ELIZABETH WEBB BEYER, individually, stipulated that no amendment to the complaint on their behalf will be made and, therefore, it is ordered that judgment of dismissal will be entered in favor of defendants ROBERT A. CANNON, M.D., WILLIAM J. WENNER, M.D., FRANK J. LOGE, individually and as director of the University of California, Davis, Medical Center and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, INC. and against plaintiffs THOMAS BEYER and ELIZABETH WEBB BEYER. Costs are awarded to defendants.
Dated December 24, 1991.
Signed by Superior Court Judge The Honorable Ronald B. Robie.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THOMAS BEYER et al.,	)	C012680
	)	
Plaintiffs and Appellants,	)	Super.Ct.No.
	)	CV520845
v.	)	
	)	
ROBERT A. CANNON et al.,	)	
	)	
Defendants and Respondents	)	

Plaintiffs Thomas and ElizaBeth Beyer (the Beyers), parents of Seth Beyer (the minor), brought suit individually and on the minor's behalf against defendants Robert Cannon, M.D., William Wenner, M.D., Frank Loge, and The Regents of the University of California, Inc., alleging violation of 42 United States Code section 1983 (§1983), battery, and negligent and intentional infliction of emotional distress as a result of incidents occurring while the minor was in defendants' care in June 1990. Defendants Cannon and Wenner were doctors on the staff of the University of California, Davis, Medical Center (UCDMC); defendant Loge was director of UCDMC's hospital and clinics.

The trial court sustained defendants' demurrer to the Beyers' second amended complaint with leave to amend on

the first three causes of action. After an unsuccessful motion for reconsideration, the Beyers declined to amend the complaint and requested the trial court to dismiss the action. The court entered judgment dis-missing the action as to the Beyers only. The Beyers' appeal from this judgment.[1] We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At the outset we note that the Beyers' noncompliance with the rules of appellate briefing has complicated our task. In their statement of facts, which grossly violates California Rules of Court, rule 15(a), by failing to include a single citation to the record, they indiscriminately mingle allegations pleaded in their second amended complaint with others which were not so pleaded. Possibly they do so in the belief that on review of a judgment dismissing a complaint after a sustained demurrer we must accept the truth of all the plaintiff's factual allegations. However, this is not quite the rule. We are required to accept as true only those facts properly pleaded in the complaint or subject to judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Furthermore, where plaintiffs have been given leave to amend their complaint and have refused to do so, we must construe the complaint strictly. (*Gonzales v. State of California* (1977) 68 Cal. App.3d 621, 635.) Accordingly, we disregard any factual allegations not

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1 In their opening brief the Beyers refer to a third amended complaint purportedly filed on behalf of the minor alone and to an order purportedly issued as to that complaint. As part of the relief they seek in this action, they ask this court to answer the question whether the purported order on the third amended complaint restores their right to proceed on their own behalf on their claims for emotional distress. Neither the purported third amended complaint nor any order thereon is in the record. In any event, an appeal from an order dismissing the Beyers' second amended complaint may not be used to raise issues arising out of later proceedings. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §252, pp. 258-259.) Therefore we do not consider the effect of any order made after the judgment from which this appeal was taken. We decline the parties' request for judicial notice of the purported order.

pleaded in the Beyers' second amended complaint.

A. The complaint.

As stated above, the Beyers pleaded four causes of action (1983, battery, negligent infliction of emotional distress, and intentional infliction of emotional distress), and the trial court dismissed the complaint as to the Beyers on all causes of action. On appeal they fail to mention the battery cause of action; thus any claim of error as to this cause of action is deemed abandoned. (*Utz v. Aureguy* (1952) 109 Cal. App.2d 803, 807.) As to their claims for emotional distress, the Beyers assert that they have stated viable causes of action and recite the rules of various cases governing these causes of action, but they cite no properly pleaded facts in the rec-ord showing why those rules as applied to this case require us to find that the trial court erred. In effect, the Beyers merely issue a "challenge to respondents to prove that the court was right." (*Estate of Palmer* (1956) 145 Cal.App.2d 428, 431.) Such a challenge impermissibly attempts to shift the burden on appeal. Therefore the Beyers' claim of error as to these causes of action is waived. (*Ibid.*)

Thus, the only issue before us is whether the trial court correctly sustained the demurrer to the Beyers' cause of action under section 1983. We now recite the facts alleged in the second amended complaint with respect to that cause of action, but omit "contentions, deductions or conclusions of fact or law" contained therein. (*Blank, supra,* 39 Cal.3d at p. 318.)

1. The facts alleged.

In support of their section 1983 cause of action, which was pleaded only against the individual defendants, the Beyers alleged the following facts:

On June 1, 1990, the Beyers brought the minor, aged seven months, to the UCDMC emergency room because he was not alert. He was admitted to the Pediatric Intermediate Intensive Care Unit.

By June 3, 1990, the minor was moribund and near death. He was tentatively diagnosed with a fatal disorder, but could not be definitively diagnosed because he probably would not have survived the necessary testing. With the Beyers' consent, UCDMC personnel took the minor off life support systems. However, late in the evening of June 3, the Beyers noted a positive change in the minor's condition and requested the minor's intravenous drip be restarted; this was done.

Between June 2 and June 8, 1990, the physicians at UCDMC gave the minor four different diagnoses. The last diagnosis, arrived at on June 8, 1990, was a very rare condition called propionic acidemia (PA).

Although the Beyers had little confidence in the ability of the UCDMC staff to diagnose or treat the minor's condition correctly at this point, they were willing to try any reasonable treatment plan suggested. At a family conference on the afternoon of June 8, 1990, the staff proposed a treatment plan consisting of a low-protein diet. The Beyers accepted this plan because they were given the freedom to choose the minor's foods so long as the foods were low in protein. However, they refused the use of a no-protein formula known as formula 80056, because the mother, ElizaBeth Beyer, who had been a registered nurse for 10 years, had observed a deterioration in the minor's condition each time during the previous week when this formula had been used. Moreover, several other commercially available formulas and low-protein foods, as well as a high-dose vitamin treatment, were available in June 1990 to treat PA.

Because the minor's condition had dramatically improved without significant medical intervention between June 4 and June 8, 1990, the minor was scheduled for discharge on June 11 or 12, 1990.

On June 9, 1990, at around 11 a.m., defendant Dr. Robert Cannon, an on-call consulting physician who had not previously been involved in the minor's case and had not seen the minor or the family before, stated that the only treatment

for PA was formula 80056 and insisted the minor be put on this formula.[2] Up until this time, formula 80056 had been recommended, but not required, by the UCDMC staff, and the Beyers' rejection of this formula had been honored.

ElizaBeth Beyer "told. . .Cannon of her concerns about formula 80056."[3] Cannon replied that he did not believe this formula could cause any detrimental side effects or allergic reactions. Beyer requested an alternative low-protein diet formula or foods and the transfer of the minor to a "metabolic center."[4]

After a conversation with the Beyers that lasted less than 15 minutes, defendant Cannon contacted a social worker for UCD and the Sacramento County police in order to obtain a police hold on the minor pursuant to Welfare and Institutions Code section 300, subdivision (b). Cannon reported to the social worker that an emergency existed and that the minor was at substantial risk of suffering serious physical harm because the Beyers would not permit the use of formula 80056. Following Cannon's report, the Sacramento County Welfare Department took custody of the minor.

In a telephone conversation with ElizaBeth Beyer at some time on June 9, 1990, Cannon stated that he was mandating formula 80056 as "a matter of principle." Possibly in the same conversation, he opined that his formula must be given because it provided vitamins and minerals, but rejected the suggestion that a different vitamin and mineral supplement could be used.

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2 The complaint alleges that Cannon was "covering for" defendant Dr. William Wenner, his partner in practice, but does not allege that Dr. Wenner had been involved in the treatment of the minor before this time. Thus the complaint does not make clear how either defendant first acquired authority to treat the minor.

3 The complaint does not plead that Beyer at this time told Cannon any specific facts about the minor's alleged reactions to the formula or about her discussions with other medical staff on this subject.

4. The complaint does not define or otherwise clarify this term.

After the minor was taken into temporary custody by the County, the Beyers took various steps to secure more appropriate medical treatment for the minor. They continued to ask that an alternative formula or dietary treatment be provided, they sought to discharge defendants Cannon and Wenner as the minor's treating physicians, they requested a second opinion from a medical expert other than Wenner, and they renewed their request for a transfer of the minor to a metabolic treatment center. The UCDMC hospital administration, including its director, defendant Loge, was informed of these requests and denied them; furthermore, the administration made no attempt to resolve the dispute between the physicians and the Beyers or to monitor the physicians' treatment of the minor.[5]

Both Cannon and Wenner failed to provide alternative dietary treatment as requested by the Beyers. Moreover, despite the Beyers' vehement protests, Wenner placed the minor on formula 80056 on or about June 13, 1990, with knowledge of the prior treatment and side effects. After receiving the formula, the minor suffered harm including neurological deterioration, cessation of respirations, seizures, skin sloughing, peeling, and skin breakdown. The minor had never experienced cessation of respirations, seizures, or skin problems before receiving the formula.

Ultimately the Beyers obtained a court order for the minor's transfer to the treatment facility at University of Missouri-Columbia. Even after the court order was made known to defendants, defendant Wenner "actively attempted to obstruct the transfer of the infant."[6] The minor was transferred on June 24, 1990.

Upon arrival at University of Missouri-Columbia, the minor was found to be in a state of complete protein

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5 The complaint does not specifically allege that defendant Loge made or participated in the decisions to deny the Beyers' requests.

6 The complaint pleads no facts indicating the manner of Wenner's alleged obstruction.

deprivation and starvation. The treating physician there prescribed a treatment plan which included more protein, regular foods, and a formula called MSUD. The Beyers agreed with this plan.

The Beyers regained custody of the minor at the jurisdictional hearing held on July 6, 1990.

As of July 1991, when the second amended complaint was filed, the minor continued to receive alternative therapy of a kind that was available in June 1990. However, he has suffered profound neurological deficits to an extent so far unknown, in addition to the other symptoms incurred after the administration of formula 80056.

2. Alleged deprivations of rights under section 1983.

Based on the above-recited facts, the Beyers alleged that defendants Cannon, Wenner, and Loge, acting under the color of their official capacities and the law of California, deprived the Beyers of "their privacy and liberty interests as concerned parents in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution, of 42 U.S.C. sections [sic] 1983 and of the laws of the State of California." In addition, all three defendants "wrongfully obtained and maintained custody of [the minor] in violation of the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution." Finally, defendants violated unspecified provisions of California Code of Regulations, title 22, section 70707.

B. The demurrer.

Defendants demurred to the second amended complaint on the grounds that they were absolutely immune from liabilityfor reporting suspected child abuse under Penal Code section 11172 and that none of the pleaded counts stated a cause of action.

As relevant to this appeal, the trial court sustained the demurrer on the first cause of action with leave to amend. The court found that defendants' conduct after the police hold

was placed on the minor was absolutely privileged under Penal Code section 11172 and that no conduct alleged prior to the police hold rose to the level of a constitutional violation under section 1983. However, the court granted leave to amend so that the Beyers could allege facts prior to the police hold which would give rise to a section 1983 cause of action.

Instead of filing an amended complaint the Beyers filed a motion for reconsideration in which they sought to allege new facts and submitted as legal authority the unpublished ruling of a Georgia trial court. The motion was denied.

ElizaBeth Beyer, a licensed attorney, appeared *pro se* at the hearing on the motion for reconsideration.[7] The trial court asked Ms. Beyer whether she had any intention of amending the complaint. She replied that she wished the complaint to stand as it was.[8] At her request, the trial court entered an order dismissing the complaint only as to the parents.

DISCUSSION

I

As already noted, on review of an appeal from a judgment sustaining a general demurrer we accept as true all facts properly pleaded in the complaint plus matters which may be judicially noticed; however, we do not presume the truth of contentions, deductions, or conclusions of fact or law pleaded in the complaint. (*Blank, supra*, 39 Cal.3d at p. 318.)

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7 Ms. Beyer has also signed or co-signed all pleadings in this case.

8 The only reason she gave for refusing to amend was the "[she felt] the issues [were] very important." This explanation is puzzling, since the trial court was not asking her to abandon these issues on which it granted leave to amend; rather, it was giving her the opportunity to state more facts showing why those issues should be decided in her favor.

Given counsel's refusal to amend her complaint, we find it peculiar that in her reply brief, in answer to defendants' argument that she may not allege facts on appeal which she could have pleaded but did not, counsel retorts: " [A] right to amend is freely given." Having declined to exercise that right when it was granted, counsel may not now invoke it in an attempt to escape the consequences of her defective briefing on appeal.

Where a plaintiff refuses to amend a complaint after being given leave to do so, we must construe the complaint strictly and presume that the plaintiff has stated as strong a case as possible. We must affirm the judgment of dismissal if it may be supported on any ground stated in the demurrer. (*Vaughn v. Hugo Neu Proler International* (1990) 223 Cal.App.3d 1612, 1616.)

II

Preliminarily we turn to defendants' claim of abolute immunity from section 1983 liability under Penal Code section 11172, subdivision (a) §11172(a)). The trial court found that this immunity barred the Beyers' section 1983 cause of action as to defendants' report of child abuse and all subsequent acts complained of. The Beyers contend that section 11172(a) immunizes only the act of reporting, no defendants' subsquent conduct after the police hold. The Beyers are correct.

Section 11172(a) forms part of the Child Abuse and Neglect Reporting Act. (Pen. Code, §11164-11174.3.) Under the Act, and "health practitioner" who knows of or reasonably suspects child abuse must report such abuse to a child protective agency as soon as possible. (Pen. Code §11166, subd.(a).) Section 11172(a) provides as relevant: "No...health practitioner...who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this article...." (Emphasis added.)

Section 11172(a) absolutely immunizes all "mandated reporters" under the Act, including "health practitioners," against "all damage claims based on the report," even should the report prove to have been negligent, reckless, or intentionally false. (*Thomas v. Chadwick* (1990) 224 Cal.App.3d 813, 819-820, 824, empahsis in original.) This immunity extends to section 1983 lawsuits. (*Id.* at pp. 824-825.) However, section 11172(a) by its terms immunizes

only the reporting of child abuse, not any and all acts which "mandated reporters" may do in connection with a case after reporting it. Defendants cite no authority which would extend section 11172(a) immunity to tortious conduct by doctors in treating an allegedly abused minor, and there is no reason to believe the Legislature meant this statute to bestow such blanket immunity. The Act to which the statute belongswas intended to encourage the reporting of child abuse "to obviate the chilling effect the spectre [sic] of civil lawsuits would have upon a reporter's willingness to become involved." (*Thomas, supra,* 224 Cal.App. 3d at p. 821.) This rationale does not justify immunizing doctors from suit for wrongful acts independent of investigating and reporting suspected child abuse. (*See Newton v. County of Napa (1990)* 217 Cal.App.3d 1551, 1561 [immunity of county welfare officials for "in-person response" to report of child abuse under Welf. & Inst. Code, §16504, does not extend to tortious conduct in carrying out investigation].)

Defendants additionally urge that federal common-law immunities protect them from suit under section 1983 for all acts alleged against them here. Since they did not demur to the complaint on this ground, they may not now raise it to justify affirming the judgment. (*Vaughn, supra,* 223 Cal.App. 3d at p. 1616.) In any event, the authorities they cite do not support them, because these cases speak only of the immunity of social workers for duties performed in connection with child abuse cases. (*Babcock v. Tyler* (9th Cir. 1989) 884 F.2d 497, 502-504; *Coverdell v. Dept. of Social & Health Services* (9th Cir. 1987) 834 F.2d 758, 762-764; *Meyers v. Contra Costa County Dept. of Soc. Serv.* (9th Cir. 1987) 812 F.2d 1154, 1157) or of the immunity of social workers and therapists for giving court testimony in such cases *(Myers v. Morris* (8th Cir. 1987) 810 F.2d 1437, 1466). The rationales of these holdings do not serve to immunize doctors for tortious conduct which falls outside the realm of reporting child abuse.

Thus the demurrer to Beyers' section 1983 action was not

properly sustained based on any claim of immunity from suit as to any act other than the reporting of child abuse.

III

However, defendants also demurred to the Beyers' complaint on the ground that even if they were not immune to a section 1983 suit, the complaint failed to state a cause of action under that provision. As we shall explain, defendants are correct.

Section 1983 provides as relevant: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

Section 1983 does not create any substantive rights; rather, it describes a remedy for the violation of a right conferred elsewhere by the United States Constitution or federal statute. *(Baker v. Mc Collan* (1979) 443 U.S. 137, 144, fn. 3 [61 L.Ed.2d 433, 442]; *Chapman v. Houston Welfare Rights Org.* (1979) 441 U.S. 600, 617-618 [60 L.Ed.2d 508, 522-523].) Therefore, to determine whether the Beyers have stated a cause of action under section 1983, we look first to the nature of the rights they allege they were deprived of by defendants' conduct.

A. The First Amendment claim.

In their second amended complaint the Beyers asserted that defendants' acts deprived them of "their privacy and liberty interests as concerned parents in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution, of 42 U.S.C. Sections [sic] 1983 and of the laws of the State of California," and additionally violated "the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution." On appeal they devote much argument to establishing that their right as parents to make medical decisions on behalf of the minor is protected by

the United States Constitution as an aspect of parental autonomy or as a component of the right to privacy exercised on the minor's behalf, a contention not disputed by defendants. However, nothing in the Beyers' appellate briefs supports the claim that this right is protected by the First Amendment. In discussing this right they refer only to "the due process clause or other rights as provided by statute."[9] Moreover, none of the cases they cite to show the existence of a constitutional right to parental autonomy locates thatright in the First Amendment. To the extent these cases identify the nature and source of the right, they describe it only as a liberty interest protected by due process under the Fifth and Fourteenth Amendments. *(Michael H. v. Gerald D.* (1989) 491 U.S. 110, 113, 118-119 [105 L.Ed.2d 91, 99, 103]; *Santosky v. Kramer* (1982) 455 U.S. 745, 753 [71 L.Ed.2d 599, 606]; *Bendiburg v. Dempsey* (11th Cir. 1990) 909 F.2d 463, 468-470; *In re Phillip B.* (1979) 92 Cal.App. 3d 796,

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9 The Beyers assert on appeal that defendants violated Welfare and Institutions Code sections 311 and 313, subdivision (a) and California Code of Regulations, title 22, section 70707. These assertions add nothing to the Beyers' argument.

Welfare and Institutions Code section 311 requires the probations officer, after having taken a minor into temporary custody, to file a petition immediately with the juvenile court so that the matter may be set for hearing, and to serve the minor's parents promptly with notice of the hearing; section 313, subdivision (a), requires the release of a minor from custody within 48 hours if no petition has been filed with the juvenile court. The Beyers failed to allege in their complaint that defendants violated these provisions, and in any event the provisions could not create grounds for liability against these defendants.

California Code of Regulations, title 22, section 70707 provides that parents have certain medical decisionmaking rights with respect to their minor childre, including the right to receive information concerning alternate courses of treatment, the right to participate actively in medical decisions (including the right to refuse treatment, to the extent permitted by law), and the right to receive reasonable responses to any reasonable requests for serice. Since these regulations merely spell out in greater detail the right to parental decisionmaking on behalf of minors which the Beyers have already alleged as a constituional right, they create no independent right giving rise to a separate claim under section 1983.

801.)[10]

Because the Beyers offer neither argument nor authority to show that defendants violated any of their rights under the First Amendment, this claim is waived. (*Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.) Therefore we turn to the Beyers' allegations that defendants' conduct violated their rights to substantive and procedural due process.

B. The due process claim.

When plaintiffs allege pursuant to section 1983 that they were deprived of a liberty interest protected under the Fifth and Fourteenth Amendments to the United States Constitution, they must state facts showing that the deprivation occurred without due process of law. (*Baker, supra,* 443 U.S. at p. 145 [61 L. Ed.2d at p. 442].) The due process clause of the United States Constitution includes both substantive and pro-cedural due process rights. *(Youngberg v. Romeo* (1982) 457 U.S. 307, 320-321 [73 L.Ed.2d 28, 40].) Substantive due process bars the government or private

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10 The Beyers cite numerous additional cases which discuss rights supposedly analogous to or related to the right of parental autonomy with regard to medical decisionmaking for minors: the right of parents or guardians to decide whether the life support systems of adult patients rendered incompetent by accident or illness should be turned off (*Cruzan v. Director, Mo. Health Dept.* (1990) 497 U.S. ___ [111 L.Ed.2d 224]; *Tune v. Walter Reed Army Medical Hosp.* (D.C. 1985) 602 F.Supp. 1452; *Bouvia v. Superior Court (Glenchur)* (1986) 179 Cal.App.3d 1127; *In the Matter of Jobes* (N.J. 1987) 529 A.2d 434); the right of children not to be confined unnecessarily for medical treatment *(Parham v. J.R.* (1979) 442 U.S. 584 [61 L.Ed.2d 101]); the right of institutionalized patients to refuse medication (*Guardianship of Roe* (Mass. 1981) 421 N.E.2d 40) or to be free of unnecessary bodily restraint (*Youngberg v. Romeo* (1982) 457 U.S. 307 [73 L.Ed.2d 28]). These cases do not help the Beyers. The fatal flaw of their complaint, as we explain post, is its failure to plead facts showing a violation of due process. Therefore it does not matter whether the right of parental autonomy with respect to making medical decisions for minors may be analogized to other constituionally protected rights.

persons acting under color of state law from engaging in certain activity regardless of the procedure by which the activity is done. (*Bendiburg, supra*, 909 F.2d at p. 468.) Procedural due process normally requires notice and an opportunity for hearing before a person may be deprived on a constitutional right, but in certain circumstances, such as emergency conditions, a post-deprivation remedy may provide all the process that is due. *(Parratt v. Taylor* (1981) 451 U.S. 527, 538-539 [68 L.Ed.2d 420, 430-431].)

1. Substantive due process.

Under the heading "Appellants' Substantive Due Process Rights Were Violated," the Beyers assert that defendants violated this form of due process by depriving them of their parental right to choose between medically acceptable alternatives, and in addition that defendants deprived the minor of "his right to be comforted by his parents due to arbitrary restrictions placed on visiting and holding." They further assert that "[a]s a direct result of [defendants'] failure to respond to the medical decisions of the parents, [the minor] suffered neurological deterioration, seizures, stopped breathing, his skin fell off and he was literally starved from lack of protein," and that these consequences would likely have been avoided had defendants granted the Beyers their right to make medical decisions for the minor. Finally, they assert that they have stated a prima facie case for violation of substantive due process "upon the face of the third amended complaint in this action." (Emphasis added.) We address these points in reverse order.

First, on appeal from the dismissal of their second amended complaint the Beyers may not allege reversible error based on a later version of the complaint which is not before us and was not before the trial court when it made the ruling appealed from. (9 Witkin, Cal. Procedure, op.cit. supra, Appeal, § 252, pp. 258-259.)

The Beyers' allegations that defendants' actions caused the minor to suffer adverse health consequences likewise fails asa

ground for showing reversible error. On review of a judgment of dismissal following a sustained demurrer, we are not required to accept the truth of "contentions, deductions, or conclusions of fact or law" drawn by plaintiff, even if pleaded in the complaint. (*Blank, supra*, 39 Cal.3d at p. 318.) We accept as true the Beyers' factual allegations that the minor suffered the conditions described above after the administration of formula 80056 and that he had never done so before receiving the formula. But the claim that the administration of the formula caused these conditions is afactual conclusion, and the further claim that these "consequences" could have been avoided if defendants had not deprived the Beyers of their right to make medical decisions for the minor is a conclusion of both law and fact. Since we are not required to accept the truth of these conclusions, they do not suffice to show the trial court erred by dismissing the complaint.

The Beyers' assertion that defendants deprived the minor of an alleged constitutional right to be comforted by his parents is out of place because the complaint was dismissed only as to the Beyers, not as to the minor. Thus, assuming the existence of a constitutional right in the minor to be comforted by his parents, any alleged deprivation of this right would not constitute grounds for reversal of the trial court's order.

Therefore the only cognizable point made by the Beyers as to substantive due process is that defendants deprived them of their right to make medical decisions on the minor's behalf by overriding their choice of treatment. This claim fails because the right invoked by the Beyers is not absolute. It is well established that the state in its capacity as *parens patriae* (or its agents) may intervene to protect a child's welfare, even at the costs of abridging parental autonomy. (See, *e.g.*, *Thompson v. Oklahoma* (1988) 487 U.S. 815, 825, fn. 23 [101 L.Ed.2d 702, 712]; *Bowen v. American Hospital Assn.* (1986) 476 U.S. 610, 628, fn. 13 [90 L.Ed.2d 584, 598]; *Bendiburg, supra*, 909 F.2d at p. 468; *Weller v. Dept. of Soc.*

Serv. for Baltimore (4th Cir. 1990) 901 F.2d 387, 392.)

In *Bendiburg, supra*, a case cited by both parties, the plaintiff alleged that defendants, who included state child wel-fare workers and privately employed medical personnel, violated substantive due process by taking temporary custody of plaintiff's injured minor child in order to perform emergency surgery on him after plaintiff had refused consent to the surgery as too risky. (909 F.2d at pp. 467-468.) The court held that plaintiff had not stated a violation because "the government may intervene in the family relationship when following proper procedures upon appropriate facts." (*Id.* at p.468.) The court held further that "circumvention of parental authority for a five-day period [in order to perform emergency surgery] did not rise to a level sufficiently egregious or shocking to sustain a substantive due process claim with respect to severance of the parent-child relationship." (*Ibid.*)

Bendiburg is on point, and the Beyers give no persuasive reason why we should reject its holding on this issue.[11]

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11 The Beyers note that *Bendiburg* also holds neither the state nor physician may "willfully disregard the right of parents to generally make decisions concerning the treatment to be given to their children." (909 F.2d at p.470.) However, given the Beyers' admission that Dr. Cannon, who made the decision to seek temporary custody of the minor, reported the existence of an emergency and the likelihood the minor would suffer substantial physical harm as the justification for seeking custody, it cannot be said that defendants here willfully [disregarded]" the Beyers' rights.

The Beyers additionally assert that *Bendiburg* holds: "If physicians disregard [parental decisions concerning treatment given to their children] before or after temporary custody, they may be liable for violations of [section] 1983." It does not. In the passage apparently relief on by the Beyers, *Bendiburg* holds only that if the physicians in the case at bench "intentionally exaggerated the emergency nature of [the minor's] medical problems, and indeed did this for the purpose of supplying the state officials with the necessary facts to obtain ex parte temporary custody on a court order with the implied approval for a consent to the surgical procedures, they have acted in concert with the state actors in such a way as to subject them to liability for a § 1983 cause of action,..." (909 F.2d at p. 469.) The Beyers pleaded no facts showing

Accordingly, like the court in *Bendiburg*, we find that no substantive due process violation has been pleaded. The trial court correctly sustained defendants' demurrer on this ground.

2. Procedural due process.

Under the heading "Appellants' Procedural Due Process Rights Were Violated," the Beyers rely entirely on factual allegations which were not set forth in their complaint: (1) after the original police hold on the minor went into effect, the custody petition was not filed within the statutory time limit under Welfare and Institutions Code section 313, subdivision (a); (2) the police thereafter took the minor into custody a second time, a procedure not authorized by statute; and (3) the parents' request for a continuance of the detention hearing was not honored by the juvenile court, which proceeded in their absence and never heard their requests for alternative treatment, a second opinion, or transfer of the minor. These allegations fail to show reversible error.

First, because the Beyers failed to allege any of the above facts in their complaint, and because even a liberalconstruction of that part of the complaint dealing with events after June 9, 1990 (as to leave to amend was not granted) would not permit us to infer any such allegations therein (see *ante*, at pp. 7-9), the Beyers may not now rely on these allegations to claim the trial court erred in dismissing their complaint.

Second, even if these allegations had been properly

...that defendants intentionally exaggerated the emergency nature of the minor's case.

In their reply brief the Beyers seek to distinguish Bendiburg by asserting inter alia that, unlike the parent in that case, they had another physifcian available and willing to use alternative treatment. However, they failed to allege specifically in their complaint that Dr. Cannon knew any other physician had prescribed a treatment other than formula 80056, and they declined the opportunity to amend so as to incorporate such allegations. Their assertions to this effect in their statment of facts on appeal, therefore, may not be considered.

pleaded they would do nothing to state a cause of action for violation of due procedural due process against these defendants. The Beyers offer neither argument nor authority to explain how due process violations performed by the police or the juvenile court could be ascribed to either the treating physicians or the hospital director in this case. They fail to allege facts showing that these defendants had any powers or duties under Welfare and Institutions Code section 313, subdivision (a), much less that these defendants breached any duty thereunder.

Third, the Beyers' complaint shows on its face that procedural due process was satisfied here. According to the complaint, defendant Cannon reported that the minor had to be put in temporary custody because of an emergency which required immediate intervention to protect the minor from physical harm. Under emergency conditions, the due process clause does not mandate a hearing before the deprivation of a constitutional right; the only issue is whether the post-deprivation remedy provided by the state is adequate. (*Parratt, supra,* 451 U.S. at pp. 538-539 [68 L.Ed.2d at pp. 430-431].)[12] After the minor was taken into custody the Beyers obtained through court hearings (1) the transfer of the minor to a different facility, (2) the adoption of an acceptable alternative treatment plan, and (3) the recovery of custody

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12 The Beyers assert in their statement of facts: "No emergency existed which would have required formula 80056 be provided to [the minor]." Even if this allegation had been pleaded, it would not be cognizable to show error on review because it states a factual conclusion which we are not bound to accept as true. (Blank, supra, 39 Cal.2d at p. 318.)

Nor may we construe the complaint's allegation that before June 9, 1990, the minor was scheduled for discharge because his condition had improved as factual support for the Beyer's conclusion that there was no emergency on June 9. Given their admission that formula 80056 was "recommended" despite their preference that it not be used, and defendant Cannon's firm belief (whether or not well-founded) that no other treatment would do, Dr. Cannon could reasonably have concluded in the exercise of his medical judgment that the Beyers' refusal to permit use of formula 80056 created an emergency which had not existed until then.

over the minor--in short, all the relief they sought. Under the circumstances, their only ground for complaint appears to be that this relief was not granted quickly enough due to purported failures of compliance with the statutes governing temporary custody--but, as we have already noted, the Beyers have alleged no facts showing that defendants Cannon, Wenner, or Loge bear any responsibility for those delays.[13]

We do not make light of the emotionally wrenching character of the events which led to the Beyers' complaint, nor do we suggest those events could not give rise to a viable cause of action against these defendants on any legal theory. Although we have refused to consider issues related to any later version of the Beyers' complaint on the ground that those issues are not properly before us in this appeal, we note that defendants do not dispute the existence of a later version of the complaint, filed on behalf of the minor only. We express no view as to the viability of any cause of action pleaded only on the minor's behalf.

DISPOSITION

The judgment is affirmed.

SIMS, J.

We concur:

PUGLIA, P.J.

NICHOLSON, J.

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13 The Beyers allege in their complaint that these defendants "obstructed" or "failed to facilitate" the transfer of the minor to another hospital before the Beyers obtained the court order for the transfer. However, the complaint failes to allege facts showing that defendats had the authority to approve the transfer of a minor in protective custody, absent court order.

In the same vein, the Beyers allege in their complaint that defendant Wenner "actively attempted to obstruct" the transfer after the court order, but state no facts showing what Wenner did or to what extent it succeeded. Nor do the Beyers explain how a mere unsuccessful "attempt to obstruct" the transfer could amount to an actual violation of procedural due process.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

THOMAS BEYER, ET AL.
Plaintiff and Appellant

vs.

ROBERT A. CANNON, M.D., ET AL.
Defendant and Respondent

By the Court:

Appellants' petition for rehearing is denied.

Dated: January 13, 1993

Signed: PUGLIA, P.J.

Third Appellate District No. C012680
S030834

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THOMAS BEYER, Et Al., Appellants

v.

ROBERT A. CANNON, Et Al., Respondents

Appellants' petition for review DENIED.

Dated: March 17, 1993

Signed: MOSK, Acting Chief Justice

Supreme Court, U.S.
FILED
JUL 2 1993
OFFICE OF THE CLERK

No. 92-1998

In The

Supreme Court of the United States

October Term, 1992

THOMAS AND ELIZABETH WEBB BEYER,

Petitioners,

vs.

ROBERT A. CANNON, M.D., et al.,

Respondents.

Petition For Writ Of Certiorari To The California Supreme Court

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QUESTION PRESENTED

Should this Court grant review of an unpublished, California Court of Appeal decision, which merely holds that the operative complaint failed to contain facts to support the contention that plaintiffs were denied a timely hearing regarding their rights as parents to make medical decisions on behalf of their minor child?

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OPINIONS AND JUDGMENTS BELOW

Petitioners correctly state that the trial court's reason for sustaining the demurrer to the second amended complaint was based on statutory immunity. However, the Court of Appeal affirmed the trial court's action on an alternative ground raised in the demurrer: i.e., the failure of the complaint to state a cause of action for violation of petitioners' civil rights. The omission of this fact from petitioner's statement of "Opinions and Judgments Below" gives the false impression that the Court of Appeal affirmed on the immunity issue – which it did not.

JURISDICTION

Petitioners invoke the Court's jurisdiction under Supreme Court Rules, Rule 10.1(b) and (c). However, as explained in greater detail below, the Court of Appeal's opinion in this case does not conflict with any federal cases, nor does it raise a federal question, let alone an important one. For these reasons, certiorari should be denied.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The only statutes which are arguably pertinent to the issue raised in this Court are the following:

California Code of Civil Procedure section 430.10, subdivision (e): "The party against whom a complaint or cross-complaint has been filed may object, by demurrer

or answer . . . on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action."

California Code of Civil Procedure section 472a, subdivision (c): "When a demurrer is sustained, the court may grant leave to amend the pleading upon any terms as may be just and shall fix the time within which the amendment or amended pleading shall be filed. . . . "

California Code of Civil Procedure section 581, subdivision (f)(2): "The court may dismiss the complaint as to that defendant when: . . . (2) . . . after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal."

STATEMENT OF THE CASE[1]

Petitioners ElizaBeth Webb Beyer and Thomas Beyer filed the instant lawsuit against respondents the Regents

[1] The Petition for Writ of Certiorari ("Petition") suffers many flaws, not the least of which is the recitation of facts outside the record and outside the allegations of the operative complaint – (see Petition at 4, fn. 1, and at 5, fn. 3) – a problem which has plagued petitioners at every stage of this litigation. (See Petition at D-2 [by the Court of Appeal: in their appellate brief, petitioners "indiscriminately mingle allegations pleaded in their second amended complaint with others which were not so pleaded"].) Such extraneous facts – coupled with petitioners' discussion of issues which are simply not relevant to the Court of Appeal's resolution of this case – should not divert this Court's attention from the real issue, as set forth herein. Toward the goal of clarifying this case, we include this statement of the case which restricts itself to relevant facts only.

of the University of California, Robert A. Cannon, M.D., William J. Wenner, M.D., and Frank J. Loge, for injuries arising out of the provision of medical treatment to petitioners' minor son, Seth Beyer ("Seth") without petitioners' consent. With respect to petitioners, the complaint purported to allege causes of action under state law for negligent infliction of emotional distress and intentional infliction of emotional distress, and under federal law for violation of civil rights under 42 U.S.C. § 1983. (Petition at Appendix A.) The instant petition involves the cause of action for violation of civil rights only.[2]

Insofar as the civil rights claim is concerned, the second amended complaint alleged, essentially, as follows: In June 1990, petitioners brought seven-month-old Seth to respondents' hospital for treatment of a rare and serious metabolic disorder. When petitioners refused recommended treatment, respondents filed a mandatory report of suspected child abuse pursuant to California Welfare and Institutions Code section 300(b), and obtained an order temporarily transferring custody of Seth to the state for the purpose of administering the recommended medical treatment. While undergoing such treatment, Seth suffered adverse effects. Petitioners eventually obtained a court order transferring Seth to another treatment facility, and custody of Seth was then restored

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[2] The complaint also alleged a cause of action on behalf of Seth Beyer; that action was not dismissed and proceeded to trial after the appeal on behalf of petitioners was resolved against them. Seth's claim is not involved in this petition.

to petitioners. The complaint further alleged that petitioners were deprived of their rights, as concerned parents, to make medical decisions on behalf of their minor child. (Petition at A-9.)

Respondents demurred to the second amended complaint, asserting, in relevant part, that the complaint failed to state a cause of action for violation of petitioners' civil rights, and that, in any event, defendants were immune from liability under state law. The trial court sustained the demurrer with leave to amend the complaint. (Petition at D-1.) Instead of amending, petitioners filed a motion for reconsideration. The court denied the motion, and again gave petitioners 10 days to amend the complaint. But petitioners refused to amend, asserting their intention to stand on the complaint as it was, and asked the court to dismiss the complaint. The court complied. (Petition at D-2.)

On December 21, 1992, the California Court of Appeal for the Third District affirmed the trial court's order sustaining respondents' demurrer to the second amended complaint. In the first part of its decision, the court found the trial court had erred in concluding that respondents were immune from liability. (Petition at D-9 to D-11.) In the second part of its decision, however, the court held that, notwithstanding this error, the demurrer was properly sustained on another ground raised by the demurrer: i.e., the failure of the complaint to state a cause of action for violation of civil rights. The court further held that, because petitioners declined to amend the complaint when given the opportunity in the trial court, the action was properly dismissed. (Petition at D-17 to D-19.)

Petitioners subsequently petitioned the Court of Appeal for rehearing, asking for leave to amend their complaint to allege facts to support their claim for violation of civil rights. The Court of Appeal denied their petition. Petitioners' subsequent petition for review in the California Supreme Court on the same ground was also denied.

SUMMARY OF ARGUMENT

The instant action was dismissed because petitioners' complaint failed to allege facts to support their claim that they were deprived of their parental rights under the Fourteenth Amendment without due process of law. The Court of Appeal concluded – consistent with federal courts which have addressed this issue – that a plaintiff has no *substantive* due process claim for violation of parental rights under the Fourteenth Amendment. The court further held that the complaint failed to allege that petitioners were denied *procedural* due process, in that the complaint failed to contain any statement that a timely hearing was not held, that petitioners were not notified of any such hearing, or that respondents – who were the treating physicians and hospital director – were in any way responsible for setting a hearing on the custody issue. Thus, the court concluded, the complaint failed to state a cause of action for violation of procedural due process *against these defendants*. The issue petitioners would have this Court consider – i.e., whether their parental rights are protected under the Fourteenth Amendment – was not ripe, and remains unripe, for review by

any court in this case, since petitioners never got past the pleading stage.

The Court of Appeal's decision is not inconsistent with any holding by this Court or any federal circuit court. The decision does not address a federal question, or a question of any importance to anyone except the parties to this action. Moreover, because the opinion is unpublished, it could have no effect on any future cases. For these reasons, there is nothing for this Court to review, and the petition for writ of certiorari should be denied.

REASONS WHY CERTIORARI SHOULD BE DENIED

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE PRESENTS NO FEDERAL QUESTION, OR OTHER IMPORTANT QUESTION, FOR THIS COURT TO REVIEW.

Petitioners contend jurisdiction of this Court is based on Rule 10.1(b) and (c) of the Supreme Court Rules. Those subdivisions provide for review by this Court in the following circumstances:

> "(b) When a state court of last resort has decided *a federal question* in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> "(c) When a state court or a United States court of appeals has decided an important *question of federal law* which has not been, but should

> be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." (Emphasis added.)

Petitioners contend the unpublished decision of the California Court of Appeal conflicts with decisions of this Court and of the Eleventh Circuit which hold that a parent's right to make decisions on behalf of their minor children is protected under the Due Process Clause of the federal constitution. (Petition at 7.)

The error in petitioners' argument lies in its misrepresentation of what happened in the California courts in this case. Petitioners ask this Court to determine whether parental rights to make medical decisions for their minor children may be usurped without due process – i.e., notice and an opportunity to be heard. They contend this Court and federal circuit courts have upheld such rights under the Fifth and Fourteenth Amendments to the United States Constitution. But, contrary to petitioners' contention, this issue was never decided – let alone decided against petitioners – by the California Court of Appeal in this case. Indeed, the issue was never properly before the California courts in this case. We explain.

Petitioners contend they were deprived of substantive and procedural due process when their minor child was taken into temporary custody by the State of California for purposes of administering medical treatment for a serious illness. Petitioners argue their right to choose the medical treatment for their child is protected under the Fourteenth Amendment.

The California Court of Appeal rejected petitioners' substantive due process claim on the ground that, although parental rights are protected under the Fourteenth Amendment, such rights are not absolute, but are subject to regulation by the state, as long as the procedures used comport with due process. This conclusion is entirely consistent with federal decisions. *See, e.g., Thomas v. Oklahoma*, 487 U.S. 815, 825, n. 23 (1988). Since there is no conflict on this issue, it is not properly a subject for review by this Court under Rule 10.1.

Petitioners also argue their procedural due process rights were violated, in that they were denied a timely hearing before being deprived of their right to choose medical treatment for their minor child. The Court of Appeal rejected this claim on the ground that it was based "entirely on factual allegations *which were not set forth in their complaint.*" (Petition at D-17, emphasis added.)[3] The court also held that, even if the facts upon which petitioners relied had been properly pleaded, such facts "would do nothing to state a cause of action for violation of due [sic] procedural due process *against these defendants.*" (Petition at D-18, emphasis in original.) The court explained:

> "The Beyers offer neither argument nor authority to explain how due process violations performed by the police or the juvenile court could be ascribed to either the treating physicians or the hospital director in this case. They fail to allege facts showing that these defendants had

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[3] This has been a consistent problem for petitioners. See footnote 1, above.

> any powers or duties under [the relevant statute], much less that these defendants breached any duty thereunder." (Petition at D-18.)

Although petitioners continue to assert that their complaint alleged "sufficient facts to show a violation of due process" (Petition at 9-10), they do so blindly, and continue to fail – as they did in the California courts – to demonstrate how this is so. A review of the complaint reveals allegations that defendants placed the minor in temporary custody of the state because an emergency existed under the relevant statutes. (Petition at A-6.) Petitioners contend no emergency existed (Petition at 5); but the second amended complaint fails to include any factual *allegations* to support petitioners' contention that the doctor believed no emergency existed. Instead, petitioners improperly rely on testimony at trial of their son's action *after* the dismissal of petitioners' action was affirmed by the California Court of Appeal, and review denied by the California Supreme Court. (Petition at 5.) Petitioners also contend the transfer in custody was illegally achieved (Petition at 10); but the complaint fails to state this. When given the opportunity to amend the complaint to include these facts, if they could, petitioners flatly refused to do so, seeking dismissal of the action instead. (Petition at D-2.) Under these circumstances, and under California law, the dismissal of petitioners' action is justified. *Vaughn v. Hugo Neu Proler Int'l*, 223 Cal.App.3d 1612, 1616 (1990).

Thus, contrary to petitioners' assertions, the California Court of Appeal's decision in this case does not conflict with any federal case upholding the protection of parental rights under the Fourteenth Amendment.

Indeed, the Court of Appeal acknowledged that parental autonomy is protected under the federal constitution, and determined only that the complaint failed to state a cause of action for violation of petitioners' due process rights.

Petitioners further contend that California case law generally conflicts with federal law by providing absolute immunity to child abuse reporters. (Petition at 13.) However, the Court of Appeal in this case refused to apply to this case the immunity to which petitioners refer. As noted above, the court expressly declined to affirm the judgment based on the immunity. (Petition at D-9 to D-10.) Thus, the issue of immunity is not ripe for decision by this Court in this case.

In sum, petitioners' action was not dismissed because California courts were confused about petitioners' rights; rather, the action was dismissed because petitioners failed to properly assert their rights. Since petitioners were, at all times, in control of the allegations of their complaint, and since they refused to amend the complaint, though given ample opportunity to do so, there is simply no question – let alone a federal question – for this Court to resolve.

CONCLUSION

For all the reasons given, the petition for writ of certiorari should be denied.

Dated: July 2, 1993

Respectfully submitted,

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